

Norwich Pharmacal applications against BVI registered agents: BVI Commercial Court provides new guidance

Briefing Summary: In its recent judgment, the BVI Commercial Court has provided clarification and guidance on Norwich Pharmacal applications against BVI registered agents. The judgment resolves earlier conflicting judgments on the appropriate procedure, sets out the Court's practice in relation to a number of aspects to Norwich Pharmacal applications, including on costs, and provides guidance for registered agents as to the Court's expectations of them.

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As the Court noted in its judgment, Norwich Pharmacal orders are an every-day feature of the legal and corporate service landscape in the BVI. The judgment will therefore be of interest to BVI legal practitioners, registered agents and those considering applying for a Norwich Pharmacal order to obtain disclosure from a BVI registered agent.

A two-stage process?

A registered agent is typically under a contractual obligation to its client to notify its client of any Court application made against the company for which it acts as registered agent. As a result, where the applicant is concerned about the registered agent "tipping off" the company about the application, the applicant will seek a seal and gag order against the registered agent preventing them from notifying their client of the application.

In those cases, the Court therefore needs to hear the application for a seal and gag order without notice to the registered agent. In some cases, applicants have also sought the Norwich Pharmacal order itself at the same time i.e. without notice to the registered agent. There were conflicting authorities on whether or not it was appropriate to do so – the general principle is that a person is entitled to be heard on an application against it.

In its judgment the BVI Court confirmed that the better and generally preferred approach to such Norwich Pharmacal applications is a two-stage one:

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1. an applicant who seeks a Norwich Pharmacal order against a BVI registered agent may first apply to the Court, without notice to the registered agent, for a seal and gag order, in support of a prospective Norwich Pharmacal application. If the seal and gag is granted, the applicant should serve the seal and gag order on the registered agent at which point the registered agent is prevented from communicating with its client about the application;
2. the applicant can then file an application seeking Norwich Pharmacal relief and asking for that application to be heard at the return date hearing scheduled for the *ex parte* seal and gag order (which will be heard within 28 days of the initial *ex parte* hearing).

It was only appropriate to apply both for a seal and gag order and a Norwich Pharmacal order at the same time on a without notice basis where there is either: (a) a genuine case of urgency, in the sense of literally no time to give notice to the registered agent; or (b) giving notice to the registered agent would defeat the purpose of the application. The Court indicated that such cases are rare and exceptional.

Costs

In relation to costs, the Court confirmed that BVI registered agents are entitled to be reimbursed for their *full* costs of the Norwich Pharmacal order application and any expense incurred by the registered agent in providing the information required by the Norwich Pharmacal order. This includes any legal fees for legal advice or representation obtained by the registered agent. The recovery of the registered agent's costs are subject, however, to any other order the Court may make and to their costs being "reasonable".

When Norwich Pharmacal relief is being granted without notice to the registered agent, the Court has a discretion, at the *ex parte* hearing, to impose a fee cap on the registered agent's costs in the *first instance*. The cap will generally be reasonably sufficient to enable the service provider to consider the Norwich Pharmacal order and comply with it. The registered agent will have a right to apply to vary or discharge any interim cap on its costs.

Guidance for registered agents

The Court encouraged BVI registered agents to ensure their files are organised so that information can be readily retrievable. Additionally, in an effort to ensure the smooth provision of documents and information at a reasonable cost, the registered agent and the applicant should usually try to reach an agreement that keeps costs within agreed bounds.

Applications for Norwich Pharmacal orders are not ordinary adversarial proceedings, and it is becoming increasingly common in the BVI to see these applications 'settle', subject to the Court being satisfied that the criteria for granting Norwich Pharmacal relief are satisfied.

The Court confirmed that once the Norwich Pharmacal order has been "exhausted", as a matter of principle, the seal and gag ought to expire or be terminated so as to permit the registered agent to communicate with its client.

Conclusion

The Court's judgment provides welcome guidance on the Court's practice on a number of issues arising in the context of Norwich Pharmacal applications. It is hoped that this guidance will assist in creating greater consistency and efficiency in how Norwich Pharmacal applications are dealt with.

A copy of the judgment is available *CIF v DLG et al* - Eastern Caribbean Supreme Court (eccourts.org).

Simon Hall and Tyrone Bailey of Carey Olsen's BVI litigation team acted for the registered agent.

Carey Olsen (BVI) L.P. is registered as a limited partnership in the British Virgin Islands with registered number 1950.

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